

2-9-95

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Consent Order

In the Matter of the
Development and Implementation
of an Interim Remedial Measure Program
for an Inactive Hazardous Waste Disposal
Site, Under Article 27, Title 13,
and Article 71, Title 27 of the
Environmental Conservation Law
of the State of New York
by
MOTOROLA, INC. AND PRESTOLITE ELECTRIC INC.
Respondents.

ORDER
ON
CONSENT
INDEX # B9-0468-94-11

WHEREAS,

1. The New York State Department of Environmental Conservation (the "Department") is responsible for enforcement of Article 27, Title 13 of the Environmental Conservation Law of the State of New York ("ECL"), entitled "Inactive Hazardous Waste Disposal Sites." This Order is entered into pursuant to the Department's authority under ECL Article 27, Title 13 and ECL 3-0301.

2. Motorola, Inc. ("Motorola"), and Prestolite Electric, Inc. ("Prestolite"), are foreign corporations organized and existing under the laws of the State of Delaware and are authorized to do business in the State of New York.

3. Motorola and Prestolite will hereafter be referred to jointly as "Respondents".

4. Motorola formerly owned and Prestolite presently owns certain real property located at 400 Main Street, Town of Arcade, Wyoming County, State of New York (the "Site") and have entered into an agreement between them (Motorola and Prestolite) to

undertake various remedial activities at the Site. Except as otherwise specifically provided herein Prestolite is a party to this Order solely as a result of the corporations' ownership of the property comprising the Site. Prestolite's primary obligation under this Order is to provide access to the Site.

5. Motorola has also held discussions with the Department concerning the various remedial activities at the Site and to offer reassurance to the Department that these activities would be performed in accordance with the standards required by the ECL and accompanying regulations in the event Respondents proceeded with these remedial activities.

6. Based upon available information, although the Department suspects that a hazardous waste has been disposed at the site, the Site has not been listed in the Registry of Inactive Hazardous Waste Disposal Sites in New York State.

7. A. Pursuant to ECL 27-1313.3.a, whenever the Commissioner of Environmental Conservation (the "Commissioner") "finds that hazardous wastes at an inactive hazardous waste disposal site constitute a significant threat to the environment, he may order the owner of such site and/or any person responsible for the disposal of hazardous wastes at such site (i) to develop an inactive hazardous waste disposal site remedial program, subject to the approval of the Department, at such site, and (ii) to implement such program within reasonable time limits specified in the order."

B. Any person under order pursuant to ECL 27-1313.3.a

has a duty imposed by ECL Article 27, Title 13 to carry out the remedial program committed to under order. ECL 71-2705 provides that any person who fails to perform any duty imposed by ECL Article 27, Title 13 shall be liable for civil, administrative and/or criminal sanctions.

C. The Department also has the power, inter alia, to provide for the prevention and abatement of all water, land, and air pollution. ECL 3-0301.1.i.

8. Motorola has submitted, and the Department has approved, a Work Plan for an Interim Remedial Measure for on-site soil stabilization and other activities at a portion of the site which is incorporated into this Order as Appendix "A". This Work Plan implements activities consistent with 40 C.F.R. Part 300 and the National Contingency Plan.

9. Motorola shall also submit to the Department a Scope of Work for the development and implementation of the following Work Plans: (a) Cemetery Creek Characterization and Remediation Plan, (b) a Ground Water Characterization Plan and (c) a Volatile Organic Compound Impacted Soil Characterization and Remediation Plan for the Site. The Scope of Work ("SOW"), upon review and approval by the Department, shall be attached to and incorporated into this Order as Appendix "B".

10. The Department and Respondents agree that the goals of this Order are that Respondents (a) implement an Interim Remedial Measure Program ("IRM Program") at a portion of the Site pursuant to Appendix "A", (b) shall develop and perform the tasks set

forth in the SOW as approved by the Department, within the time limits specified therein and (c) reimburse the State's administrative costs.

11. Respondents, having waived their right to a hearing herein as provided by law, and having consented to the issuance and entry of this Order, agree to be bound by its terms. Respondents consent to and agree not to contest the authority or jurisdiction of the Department to issue or enforce this Order, and agree not to contest the validity of this Order or its terms other than as provided in Paragraph XIII herein. This Order does not relieve Respondents of any obligations they may have to perform any further investigation of Site conditions, including a Remedial Investigation and Feasibility Study, and if necessary, additional remedial activities at the Site.

NOW, having considered this matter and being duly advised, IT IS ORDERED THAT:

I. Information Submittal

Within 60 days after the effective date of this Order, Motorola shall submit to the Department all data within their possession or control regarding the presence or suspected presence of hazardous wastes at the Site, to the extent that such data has not been previously been provided to the Department. The data shall include:

a) a brief history and description of the Site to the extent known, an identification of the types, estimated quantities, physical state, location and dates of disposal of hazardous

waste, as well as the names of "responsible parties" and their relationship to the waste and to the Site; and

b) a description of the results of any previous environmental investigations of the Site performed by or on behalf of the Respondents together with copies of topographic surveys, property surveys, engineering studies and aerial photographs in the possession of the Respondents.

II. Performance and Reporting of IRM Program

A. Pursuant to the schedule in Appendix "A", Motorola shall commence and perform the IRM Program.

B. During the performance of the IRM Program, Motorola must have on-Site a full-time representative who is qualified to supervise the work done.

C. Within the time frame set forth in the IRM Work Plan, Motorola must prepare an IRM report that includes all data generated and all other information obtained during the IRM Program and identifies any additional data relevant to the remediation of the Site that must be collected ("IRM Report"). The IRM Report shall be prepared by and have the signature and seal of a professional engineer who shall certify that the IRM Report was prepared in accordance with this Order. ✓

III. Progress Reports

A. If the IRM field work requires more than two months for completion, Motorola shall submit to the parties identified in subparagraph XI in the numbers specified therein copies of written monthly progress reports that: (i) describe the actions

which have been taken toward achieving compliance with this Order during the previous month; (ii) include all results of sampling and tests and all other data relevant to the remediation of the Site generated by Motorola or Motorola's contractors or agents in the previous month, including quality assurance/quality control information, whether conducted pursuant to this Order or conducted independently by Respondents; (iii) identify all work plans, reports, and other deliverables required by this Order that were completed and submitted during the previous month; (iv) describe all actions, including, but not limited to, data collection and implementation of work plans, that are scheduled for the next month and provide other information relating to the progress at the Site; (v) include information regarding percentage of completion, unresolved delays encountered or anticipated that may affect the future schedule for implementation of Respondents' obligations under the Order, and efforts made to mitigate those delays or anticipated delays; and (vi) include any modifications to any work plans that Motorola has proposed to the Department or that the Department has approved. Motorola shall submit these progress reports to the Department by the tenth day of every month following the effective date of this Order in the event that the foregoing requirements of subparagraph III(A) of this Order are brought into effect by performance of IRM field work requiring more than two (2) months for completion.

B. Respondents shall allow the Department to attend, and

Motorola shall provide the Department at least seven days advance notice herein of the occurrence of, any of the following, if any such meetings or inspections take place: prebid meetings, job progress meetings, substantial completion meeting and inspection, and final inspection and meeting.

IV. Scope of Work

A. Within 90 days of the effective date of this Order, Motorola shall submit to the Department for its review and approval the SOW for development and implementation of the Work Plans described below:

(1) Cemetery Creek Characterization/Remediation Plan

Motorola shall develop a Work Plan, based upon the SOW for submittal to the Department, detailing a sediment sampling program to determine the potential extent of cadmium impacts for Cemetery Creek. The Work Plan shall be prepared in accordance with Department requirements and submitted to the Department within 30 days after the Department's approval of the SOW. Upon approval, Motorola shall commence and perform the Work Plan.

Within a time frame set forth in the approved Work Plan, Motorola shall prepare a Cemetery Creek Characterization/Interim Remedial Measures Plan ("Creek IRM") that includes all data generated and all other pertinent information obtained during implementation of the Work Plan. Upon approval, Motorola shall commence with implementation of the Creek IRM, as necessary.

(2) Groundwater Characterization Plan

Motorola shall prepare a Groundwater Characterization

submittal which shall summarize all groundwater data to date, provide details regarding the soil vapor extraction (SVE) system installed beneath the slab floor of the Prestolite facility to address suspect VOC source(s) and an evaluation of the current effectiveness of the remedy. The submittal shall include engineering backup justifying why the SVE option was selected and shall include proposed remediation criteria for the soils. In addition, recommendations shall be made for any additional groundwater characterization necessary to define the extent of groundwater impacts and provide contaminant migration pathway analysis along with a schedule for implementation of remediation, if necessary.

(3) Volatile Organic Compound (VOC) Impacted Soil Characterization/Remediation Plan

Motorola shall prepare a VOC Soil Characterization/Interim Remedial Measures Plan ("Soil IRM") for VOC impacted soils in the vicinity of the former chemical storage building. The Soil IRM Plan shall be prepared in accordance with Department requirements and submitted for Department review and approval. Upon approval, Motorola shall implement the Soil IRM Plan.

B. The review and approval of the SOW, and each of the required submittals, shall be in accordance with paragraph V of this Order. The submittals shall be prepared by and have the signature and seal of a professional engineer who shall certify that the submittals were prepared in accordance with this Order.

C. Any Work Plans required by the approved SOW, must

describe the remedial objectives of the IRM Program and the methods and procedures to be implemented to achieve the objectives. Accordingly, it must include, but not be limited to, the following:

1. To the best of Respondents' current understanding, a brief history and description of the Site, including the types, quantities, physical state, location, and dates of disposal of hazardous waste, including methods of disposal and spillage of such wastes, Site physiology, geology, and ground and surface water hydrology;
2. Identification of the initial data quality objectives. If sufficient information does not presently exist to identify those objectives, the IRM Work Plan must define the technical data needed and the timetable to be followed to gather the necessary information to identify those objectives;
3. A chronological description of the anticipated IRM activities together with a schedule for the performance of those activities. The activities described must include, at a minimum:
 - a. Site preparation (including clearing and grubbing, and development of access roads, office trailer(s), a field laboratory, utilities, consolidation tank(s), decontamination pad(s), drum staging area(s), and equipment);
 - b. detailed flow, construction and equipment diagrams and specifications;
 - c. excavation (including descriptions of

how it will be undertaken);

d. waste handling (including inventorying of the waste by quantity, physical state, labeling, and contents; and management of the soil);

e. preparing waste for transportation and disposal (including proper manifesting);

f. waste characterization and consolidation (including sampling methodology, chain of custody, classification, consolidation, and compatibility of hazardous waste groups);

g. disposal method and identification of the permitted treatment, storage, and disposal facilities proposed to receive the waste;

h. a sampling program to define residual contamination;

i. decontamination of personnel and equipment; and

j. Site restoration; and

4. A Sampling and Analysis Plan that must include:

a. A quality assurance project plan that describes the quality assurance and quality control protocols necessary to achieve the initial data quality objectives. This plan must designate a data validation expert and must describe such individual's qualifications and experience;

b. A field sampling plan that defines

sampling and data gathering methods in a manner consistent with the "Field Methods Compendium," OSWER Directive 9285.2-11 (draft June 1993), as supplemented by the Department;

c. Identification of the laboratory to be used for the analysis of the samples to be collected and the quality, assurance and quality control protocols the laboratory will use in analyzing those samples; and

d. Identification of the laboratory or individual to conduct data validation on all analytical results prepared by the laboratory conducting the analysis of samples collected at the Site:

5. A health and safety plan to protect persons at and in the vicinity of the Site during the performance of the IRM Program prepared by a certified health and safety professional in accordance with 29 CFR 1910 and all other applicable standards; and

6. A contingency plan to be implemented in the event that any element of the IRM Program fails to operate in accordance with the Department-approved IRM Work Plan.

D. Any Work Plans required by the approved SOW, upon review and approval of the Department, shall be attached to and incorporated into this Order as individual appendices.

E. The Work Plans resulting from the approved SOW shall be prepared and implemented in accordance with the appropriate USEPA and Department technical and administrative guidance documents.

F. Within 30 days after the Department's approval of each Work Plan, Motorola shall establish a mailing list and participate in any Citizen Participation activities.

V. Review of Submittals

A. (1) The Department shall review each of the submittals Motorola makes pursuant to this Order to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and generally accepted technical and scientific principles. The Department shall notify Respondents in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order.

(2) (a) If the Department disapproves a submittal, it shall so notify Respondents in writing and shall specify the reasons for its disapproval. Within the period of time specified in the notice of disapproval, but not less than sixty (60) days, Motorola shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

(b) After receipt of the revised submittal, the Department shall notify Respondents in writing of its approval or disapproval. If the Department disapproves the revised submittal, the Department shall notify Respondents in writing of the Department's objections and reasons therefore within the period of time specified in the notice of disapproval,

but in no event fewer than sixty (60) days, Motorola shall make a re-revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the re-revised submittal. If the Department disapproves the re-revised submittal, Motorola shall be in violation of this Order and the Department may take any action or pursue whatever rights it has pursuant to any provision of statutory or common law unless Motorola invokes the dispute resolution mechanism provided in paragraph XIV herein within twenty (20) days of its receipt of the notice of disapproval of the re-revised submittal. If the Department approves the revised or re-revised submittal, it shall be incorporated into and become an enforceable part of this Order.

B. The Department may request in writing that Motorola modify and/or amplify and expand a submittal, and associated work, if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. Any request so made by the Department shall include an explanation of the basis for the request. In the event that Motorola refuses to undertake the request within the period of time specified therein, Motorola shall be in violation of this Order and the Department may take any action or pursue whatever rights it has pursuant to statutory or common law, unless Motorola invokes the dispute resolution mechanism provided in paragraph XIV herein within twenty (20) days of their receipt of

any Department written request to modify and/or amplify and expand a submittal and/or associated work.

VI. Penalties

A. Respondents' failure to comply with any term of this Order constitutes a violation of this Order and the ECL.

B. Respondents shall not suffer any penalty under this Order or be subject to any proceeding or action for any remedy or relief if it cannot comply with any scheduling requirements of this Order because of an act of God, war, or riot or because of any condition or event entirely beyond the control of Respondents or their agent or agents carrying out Respondents' obligations under this Order. Respondents shall immediately notify the Department in writing when they obtain knowledge of any such condition and request an appropriate extension or modification of this Order.

Increased costs or expenses of any work to be performed under this Order, the financial inability of Respondent to perform such work, the failure of Respondent to make complete and timely application for any required approval or permit, and nonattainment of the goals, standards and requirements of this Order do not constitute conditions or events warranting the relief set forth in this subparagraph.

C. (1) As long as Respondents comply with the terms of this Order and any Appendix thereto, the Department shall not bring any action relative thereto which seeks relief which is inconsistent with or duplicative of relief provided for in this

Order except as provided in subparagraph VIII.B.

(2) Upon the Department's approval of all submittals identified in paragraph IV herein, and upon payment of all monies specified in paragraph VIII herein, Respondents, shall have fulfilled their obligations pursuant to this Order, and their obligations under this Order shall terminate with the exception of paragraph IX herein.

VII. Entry upon Site

Respondents hereby consent following reasonable notice to Respondents to the entry upon the Site or areas in the vicinity of the Site which may be under the control of Respondents by any duly designated employee, consultant, contractor, or agent of the Department or any State agency for purposes of inspection, sampling, and testing and to ensure Respondents' compliance with this Order. Motorola shall provide the Department with suitable office space at the Site, including access to a telephone, and shall permit the Department full access to all records relating to matters addressed by this Order and job meetings.

VIII. Payment of State Costs

Within 30 days after receipt of an itemized invoice from the Department, Motorola shall pay to the Department a sum of money which shall not exceed \$15,000.00 and which shall represent reimbursement for the State's expenses including, but not limited to, direct labor, fringe benefits, indirect costs, travel, analytical costs, and contractor costs incurred by the State of New York for work performed at the Site to date, as well

as for negotiating this Order, reviewing and revising submittals made pursuant to this Order, overseeing activities conducted pursuant to this Order, collecting and analyzing samples, and administrative costs associated with this Order. Such payment shall be made by certified check payable to the Department of Environmental Conservation. Payment shall be sent to the Bureau of Program Management, Division of Hazardous Waste Remediation, N.Y.S.D.E.C., 50 Wolf Road, Albany, NY 12233-7010. Itemization of the costs shall include an accounting of personal services indicating the employee name, title, biweekly salary, and time spent (in hours) on the project during the billing period, as identified by an assigned time and activity code. This information shall be documented by quarterly reports of Direct Personal Service. Approved agency fringe benefit and indirect cost rates shall be applied. Non-personal service costs shall be summarized by category of expense (e.g., supplies, materials, travel, contractual) and shall be documented by the New York State Office of the State Comptroller's quarterly expenditure reports.

IX. Department Reservation of Rights

A. Nothing contained in this Order shall be construed as barring, diminishing, adjudicating, or in any way affecting any of the Department's rights including, but not limited to nor exemplified by, the following:

1. the Department's right to bring any action or proceeding against anyone other than Respondents and/or any of

Respondents' directors, officers, employees, servants, agents, successors, and assigns;

2. the Department's right to enforce this Order against Respondents and/or any of Respondents' successors and assigns if Respondents fail to satisfy any of the terms of this Order;

3. the Department's right to bring any action or proceeding against Respondents and/or any of Respondents' successors and assigns with respect to claims for natural resources damages as a result of the release or threatened release of hazardous substances or constituents at or from the Site or areas in the vicinity of the Site;

4. the Department's right to bring any action or proceeding against Respondents and/or any of Respondents' directors, officers, employees, servants, agents, successors, and assigns with respect to hazardous substances that are present at the Site or that have migrated from the Site;

5. the Department's right to gather information and enter and inspect property and premises.

B. Nothing contained in this Order shall be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers.

X. Indemnification

Respondents shall indemnify and hold the Department, the State of New York, and their representatives and employees harmless for all claims, suits, actions, damages, and costs of

every name and description arising out of or resulting from the fulfillment or attempted fulfillment of this Order by Respondents and/or any of Respondents' directors, officers, employees, servants, agents, successors, and assigns; provided however, that Respondents shall not be required to indemnify and hold the Department, the State of New York or their representatives and employees harmless for any claims, suits, actions, damages and costs of any name and description arising out of or resulting from the negligence of the Department or State of New York, or their representatives or employees.

XI. Public Notice

A. If Prestolite, proposes to convey the whole or any part of Respondent's ownership interest in the Site prior to the completion of the IRM Program, Prestolite shall, not fewer than 60 days before the date of conveyance, notify the Department in writing of the identity of the transferee and of the nature and proposed date of the conveyance and shall notify the transferee in writing, with a copy to the Department, of the applicability of this Order.

B. Within thirty days after the effective date of this Order, Prestolite shall file a deed notification with the Wyoming County Clerk to give all parties who may subsequently acquire any interest in the site notice of this Consent Order. Such notification may be withdrawn when the Site is delisted.

XII. Communications

A. All written communications required by this Order

shall be transmitted by United States Postal Service, by private courier service, or hand delivered as follows:

Communication from Respondents shall be sent to:

1. Regional Director, Region 9
New York State Department of Environmental
Conservation
270 Michigan Avenue
Buffalo, NY 14203
2. Director, Bureau of Environmental
Exposure Investigation
New York State Department of Health
2 University Place
Albany, New York 12203
3. Director, Division of Hazardous Waste
Remediation
New York State Department of Environmental
Conservation
50 Wolf Road
Albany, NY 12233-7010
4. Joseph P. Ryan, Esq.
Division of Environmental Enforcement
New York State Department of Environmental
Conservation
270 Michigan Avenue
Buffalo, NY 14203

B. Copies of work plans and reports shall be submitted as follows:

1. Four copies (one unbound) to
Martin Doster, Region 9
Division of Hazardous Waste Remediation
New York State Department of Environmental
Conservation, Buffalo, New York
2. Two copies to the Director, Bureau of
Environmental Exposure Investigation.
Cameron O'Connor
3. Director, Division of Hazardous
Waste Remediation
New York State Department of Environmental
Conservation, Albany, NY 12233-7050

4. Joseph P. Ryan, Esq.
Division of Environmental Enforcement
New York State Department of Environmental
Conservation, Buffalo, New York

C. Communication to be made from the Department to

Respondents shall be sent to:

William Fairbank, Esq.
Motorola, Inc.
1301 East Algonquin Road
Schaumburg, Illinois 60196

Michael Loch
Project Manager
Motorola, Inc.
400 Commercial Avenue
Northbrook, Illinois 60062

Craig A. Slater, Esq.
Saperston & Day, P.C.
1100 M&T Center
Three Fountain Plaza
Buffalo, New York 14203-1486
Attorney for Motorola, Inc.

Len Mason
Prestolite Electric, Inc.
400 Main Street
Arcade, New York 14009

David P. Flynn, Esq.
Phillips, Lytle, Hitchcock, Blaine & Huber
3400 Marine Midland Center
Buffalo, New York 14203
Attorney for Prestolite Electric, Inc.

D. The Department and Respondent reserve the right to designate additional or different addressees for communication or written notice to the other.

E. Within 60 days of the Department's approval of any report submitted pursuant to this Order, Respondents shall submit to the Department a computer readable magnetic media copy of the approved report in American Standard Code for Information

Interchange (ASCII) format.

XIII. Contribution

A. Nothing in this Order shall be construed to create any rights in, or grant any cause of action to, any person not identified in this Order. The preceding sentence shall not be construed to waive or nullify any rights that any person not a signatory to this Order may have under applicable law. The Department and Respondents expressly reserve any and all rights (including, but not limited to, any right to contribution), defenses, claims, demands, and causes of action which each may have with respect to any matter, transaction, or occurrence relating in any way to the Site against any person not a party hereto.

B. With respect to potential actions or claims for contribution against Respondents for matters addressed in this Order, the Department agrees that Respondents are entitled to protection from any such contribution action and/or claim as provided by the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), §113(f)(2), 42 U.S.C. 9613(f)(2).

C. Respondents agree that with respect to any suit or claim for contribution brought against Respondents for matters related to this Order, Respondents will notify the Department in writing within ten (10) days of receipt of the complaint pursuant to paragraph XI herein. Respondents shall also notify the Department within ten (10) days of service or receipt of any

Motion For Summary Judgment, and within ten (10) days of receipt of any order from a court setting a case for trial.

XIV. Dispute Resolution

A. Unless otherwise expressly provided for in this Order, the dispute resolution procedures of this subparagraph shall be the exclusive mechanism to resolve any disputes arising under or with respect to this Order between Respondents and the Department. However, the procedures set forth in this subparagraph shall not apply to actions by the Department to enforce obligations of the Respondents that have not been disputed in accordance with this subparagraph.

B. Any dispute which arises under or with respect to this Order shall in the first instance subject to informal negotiations shall not exceed twenty (20) days from the time that the dispute arises, unless it is modified by written agreement. The dispute shall be considered to have arisen when one party sends to the other party a Written Notice of Dispute in accordance with subparagraph XI herein.

C. If the Department disapproves a re-revised submittal, Respondents shall be in violation of this Order unless, within 20 days of receipt of the Department's notice of disapproval, Respondents serve on the Department's Director of Hazardous Waste Remediation ("the Director") a written statement of the issues in dispute, the relevant facts upon which the dispute is based, and factual data, analysis or opinion supporting its position, and all supporting documentation on

which Respondents rely (hereinafter called the "Statement of Position"). The Department shall serve its Statement of Position, including supporting documentation no later than twenty (20) days after receipt of Respondents' Statement of Position. In the event that these 20-day time periods for exchange of Statements of Position may cause a delay in the work being performed under this Order, the time periods may be shortened upon and in accordance with notice by the Department as agreed to by Respondents.

An administrative record of any dispute under this Paragraph shall be maintained by the Department. The record shall include the Statement of Position of each party served pursuant to the preceding paragraph, and any relevant information. The record shall be available for review of all parties and the public.

Upon review of the administrative record as developed pursuant to this Paragraph, the Director shall issue a final decision and order resolving the dispute. Respondents shall revise the submittal in accordance with the Department's specific comments, as may be modified by the Director and except for those which have been withdrawn by the Director, and shall submit a revised submittal. The period of time within which the submittal must be revised as specified by the Department in its notice of disapproval shall control unless the Director revises the time frame in the Director's final decision and order resolving the dispute.

After receipt of the revised submittal, the Department shall

notify Respondents in writing of its approval or disapproval of the revised submittal.

If the revised submittal fails to address the Department's specific comments, as modified, and the Department disapproves the revised submittal for this reason, Respondent shall be in violation of this Order and the ECL.

In review by the Director of any dispute pursued under this Paragraph, Respondent shall have the burden of proving that there is no rational basis for the Department's position.

The invocation of the procedures stated in this Paragraph shall not extend, postpone, or modify Respondents' obligations under this Order with respect to any other nondisputed items, unless and until the Department agrees or a court determines otherwise. The Director's final decision issued pursuant to this paragraph shall serve as the final agency position for the purposes of any Article 78 action on that matter.

XV. Miscellaneous

A. All activities and submittals required by this Order shall address both on-Site and known off-Site contamination resulting from the disposal of hazardous waste at the Site.

B. Motorola shall retain professional consultants, contractors, laboratories, quality assurance/quality control personnel, and data validators acceptable to the Department to perform the technical, engineering, and analytical obligations required by this Order. The experience, capabilities, and qualifications of the firms or individuals selected by Motorola

have been and shall be submitted to the Department. The Department's approval of these firms or individuals shall be obtained before the start of any activities for which Motorola and such firms or individuals will be responsible. The responsibility for the performance of the professionals retained by Motorola shall rest solely with Motorola.

C. The Department shall have the right to obtain split samples, duplicate samples, or both, of all substances and materials sampled by Respondents, and the Department also shall have the right to take its own samples. Motorola shall make available to the Department the results of all sampling and/or tests or other data generated by Respondents with respect to implementation of this Order and shall submit these results in the progress reports required by this Order.

D. Motorola shall notify the Department at least ten (10) working days in advance of any field activities to be conducted pursuant to this Order.

E. Respondents shall obtain all permits, easements, rights-of-way, rights-of-entry, approvals, or authorizations necessary to perform Respondents' obligations under this Order. The Department shall assist the Respondents to the extent practicable in the event that such assistance is requested or required by Respondents to secure any such necessary permits, easements, right-of-way, rights-of-entry, approvals or authorizations needed to perform this Order.

F. Respondents and Respondents' successors and

assigns shall be bound by this Order. Any change in ownership or corporate status of Respondents including, but not limited to, any transfer of assets or real or personal property shall in no way alter Respondents' responsibilities under this Order.

Respondents' officers, directors, employees, servants, and agents shall be obliged to comply with the relevant provisions of this Order in the performance of their designated duties on behalf of Respondents.

G. Motorola shall provide a copy of this Order to each contractor hired to perform work required by this Order and to each person representing Respondents with respect to the Site and shall condition all contracts entered into in order to carry out the obligations identified in this Order upon performance in conformity with the terms of this Order. Motorola or Motorola's contractors shall provide written notice of this Order to all subcontractors hired to perform any portion of the work required by this Order. Motorola shall nonetheless be responsible for ensuring that Motorola's contractors and subcontractors perform the work in satisfaction of the requirements of this Order.

H. "Interim Remedial Measure" shall have the meaning set forth in the Department's "Division Technical and Administrative Guidance Memorandum: Interim Remedial Measures" (# HWR-91-4042, dated February 12, 1991) and 6 NYCRR 375-1.3(n) or modifications thereto.

I. All references to "professional engineer" in this Order are to an individual registered as a professional engineer

in accordance with Article 145 of the New York State Education Law.

J. All references to "days" in this Order are to calendar days unless otherwise specified.

K. The section headings set forth in this Order are included for convenience of reference only and shall be disregarded in the construction and interpretation of any of the provisions of this Order.

L. (1) The terms of this Order shall constitute the complete and entire Order between Respondents and the Department concerning the Site. No term, condition, understanding, or agreement purporting to modify or vary any term of this Order shall be binding unless made in writing and subscribed by the party to be bound. No informal advice, guidance, suggestion, or comment by the Department regarding any report, proposal, plan, specification, schedule, or any other submittal shall be construed as relieving Respondents of Respondents' obligation to obtain such formal approvals as may be required by this Order.


(2) If Respondents desire that any provision of this Order be changed, Respondents shall make timely written application, signed by the Respondents, to the Commissioner setting forth reasonable grounds for the relief sought. Copies of such written application shall be delivered or mailed by Respondents to the parties identified in subparagraph XI.A.

M. The effective date of this Order shall be the date it is signed by the Commissioner or his designee.

DATED: *Albany*, New York
January 30 1995

LANGDON MARSH
Commissioner
New York State Department
of Environmental Conservation

By:


Ann H. DeBarbieri
Deputy Commissioner

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Order.

MOTOROLA, INC.

By: _____

Dave Melka

(Type Name of Signer)

Title: Corporate Vice President and General Manager

Date: December 16, 1994

Illinois
STATE OF ~~NEW YORK~~)

COUNTY OF Cook)

S.S.:

On this 16 day of December, 1994,
before me personally came Dave Melka, to me
known, who, being by me duly sworn, did depose and say that he
resides in Chicago, Illinois; that he is the
Senior Vice President and General Manager of the Motorola Corporation,
the corporation described in and which executed the foregoing
instrument; that he knew the seal of said corporation; that the
seal affixed to said instrument was such corporate seal; that it
was so affixed by the order of the Board of Directors of said
corporation, and that he signed his name thereto by like order.

Rose M. Shilskey
Notary Public



CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives Respondent's right to a hearing herein as provided by law, and agrees to be bound by this Order.

PRESTOLITE ELECTRIC, INC.

By: *S Ferguson*
S FERGUSON
(Type Name of Signer)

Title: *President*

Date: *Jan 12/95*

STATE OF NEW YORK)

COUNTY OF *Cattaraugus*) ss:

On this *12th* day of *January*, 1994⁵, before me personally came *Stephen Ferguson*, to me known, who, being by me duly sworn, did depose and say that he resides in *Arcade, N.Y. @ 400 Main Street* that he is the *President* of the *Prestolite Electric Inc.* the corporation described in and which executed the foregoing instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by the order of the Board of Directors of said corporation, and that he signed his name thereto by like order.

Suzanne McLam
Notary Public

SUZANNE McLAM NO. 4845640
NOTARY PUBLIC, STATE OF NEW YORK
QUALIFIED IN CATTARAUGUS CO.
MY COMMISSION EXPIRES *10/31/95*

SAPERSTON & DAY, P.C.

1100 M&T CENTER • THREE FOUNTAIN PLAZA • BUFFALO, NEW YORK 14203-1486